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IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JOE LANDRUM,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Mississippi chancery court issued a summary order forbidding petitioner from broadcasting paid advertisements concerning an impending state election that used the name of the Respondent candidate. After the Mississippi Supreme Court denied a motion to dismiss the appeal for lack of a final and appealable order, the en banc court held that Petitioner's request that this Court grant an emergency stay of the prior restraint waived Petitioner's state right to appeal. In these circumstances:

1. Did the Chancery Court's summary order against future political speech violate the First and Fourteenth Amendments to the United States Constitution?

2. Did the Mississippi Supreme Court's ruling penalizing Petitioner's exercise of its federal right to petition this Court by curtailing Petitioner's state appellate rights violate the Supremacy Clause of, and the Fourteenth Amendment to, the United States Constitution?

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America was incorporated in the District of Columbia in 1916. It is a non-profit, non-stock corporation, exempt from taxation under I.R.C. § 501(c)(6).

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CHAMBER OF COMMERCE OF
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BILLY JOE LANDRUM,
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Petition for a Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI

The Chamber of Commerce of the United States of America ("Chamber") respectfully petitions for a writ of certiorari to review the February 7, 2002, Order of the Mississippi Supreme Court holding that, by seeking emergency relief from this Court, the Chamber waived its right to state appellate consideration of its First Amendment challenges to a prior restraint against the Chamber's political speech that was issued on Sunday, November 5, 2000, by the Chancery Court of the First Judicial District of Jones County, Mississippi.

OPINIONS AND ORDERS BELOW

The February 7, 2002, Order of the Mississippi Supreme Court (No. 2000-CA-02048-SCT) is at Pet. App. 1a. The November 5, 2000, Order of the Chancery Court of the First

Judicial District of Jones County, Mississippi (No. 2000-0204-E) is at Pet. App. 4a. Also included in the Appendix are the March 2, 2001, Order of a panel of the Mississippi Supreme Court denying the motion to dismiss the appeal and stays issued for this Court by Justice Scalia of the November 5 Order and of several similar Orders (Pet. App. 89a, 64a, 63a, and 72a). None of these orders is officially reported.[1]

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a) (2000).

The Petition Is Timely

The Mississippi Supreme Court entered its order on February 7, 2002.

The Petition Is Not Moot

Where, as here, "the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration" and "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again," this Court will grant review despite traditional jurisdictional constraints. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *see also Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

The November 5, 2000, prior restraint challenged here enjoined speech concerning the candidacy of Respondent Judge Landrum in an election that occurred two days later on

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[1] Reference is made herein to an opinion of the United States District Court for the Southern District of Mississippi, *Chamber of Commerce v. Moore*, No. 3:00CV778WS, 2000 WL 33709454 (S.D. Miss. Nov. 2, 2000), and an opinion of the United States Court of Appeals for the Fifth Circuit reversing the district court, No. 00-60779, 2002 WL 518638 (5th Cir. Apr. 5, 2002). These opinions and their holdings are not challenged by this petition, but they are included as background material at Pet. App. 6a-31a and 170a-187a, respectively.

November 7, 2000, which Respondent lost. Elections typically occur over a relatively short period, and prior restraints against election-related speech tend to be granted as the election nears. But even if a prior restraint were granted months prior to an election, orderly pre-election review on the merits seldom, if ever, would be practical. *See Roe v. Wade*, 410 U.S. 113, 125 (1973) (the typical human gestation period is too short to allow orderly review). Thus, although the Chamber expects to engage in similar speech during future elections in Mississippi and elsewhere, there is little likelihood that similar future orders will reach this Court for review before the relevant election. In short, this case is not moot because this is a classic example of a case that is "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

The Petition Challenges A Final Ruling

The petition here challenges a final appellate judgment concerning a final trial court judgment.[2] The Mississippi Supreme Court's February 7, 2002, Order that the Chamber waived its right to appeal means that the November 5, 2000, Order cannot be reviewed for constitutionality unless

[2] Moreover, the underlying prior restraint order was final because it granted all the relief that Judge Landrum sought. *See* 15A Charles Alan Wright, et al., *Federal Practice and Procedure*, § 3912 at 449-50 (2d ed. 1992) ("[I]f suit is brought solely for the purpose of obtaining short-term injunctive relief, an order granting a temporary restraining order may be found appealable as a final judgment on the ground that it has effectively granted all the relief sought in the action"); 13 James Wm. Moore, *Moore's Federal Practice* § 65.41 (3d ed. 1997) ("the issue of appealability is not limited by the trial court's terminology"; "when the grant or denial of a temporary restraining order may dispose of the action for injunctive relief, the grant or denial has been held appealable"). Significantly, the Mississippi Supreme Court's Order of March 2, 2001, denied a motion to dismiss for lack of finality. (Pet. App. 89a).

certiorari is granted by this Court.[3] The Mississippi Supreme Court's waiver ruling is a final ruling. Significantly, the Mississippi Supreme Court denied Appellee Landrum's motion to dismiss the appeal for lack of finality.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Article VI, clause 2, provides that the "Constitution, and the laws of the United States . . . shall be the supreme Law of the Land; and that Judges in every state shall be bound thereby, anything in the Constitutions or Laws of any state to the contrary notwithstanding."

The First Amendment to the United States Constitution provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend I.

The Fourteenth Amendment to the United States Constitution forbids any State to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" or to "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1.

No Mississippi statute purports to authorize either the prior restraint or the waiver challenged through this petition. This petition does not request construction or invalidation of any

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[3] A petition for writ of certiorari challenging another similar prior restraint related to the same Chamber of Commerce broadcasts was filed on February 1, 2001. *Chamber of Commerce v. Vollor,* S. Ct. Dkt. No. 00-1255. The respondent there argued that the Mississippi Supreme Court first should be given a chance to consider an appeal on the merits, and certiorari was denied by this Court's order of May 29, 2001. *Chamber of Commerce v. Vollor*, 532 U.S. 1058 (2001). The Mississippi Supreme Court's February 7, 2002, Order removes that prematurity objection, and raises a separate and distinct issue of importance to future elections that also merits review.

Mississippi statute regulating elections. However, certain Mississippi campaign finance statutes form part of the litigation background from which this petition arises and, thus, are included at Pet. App. 190a.

STATEMENT OF THE CASE

This petition challenges one of four Mississippi state court orders that enjoined the public broadcast of certain Chamber advertising just before Mississippi's November 7, 2000, election of four members of the Mississippi Supreme Court. The core objective of the petition is to establish explicitly and authoritatively that the increasing tendency of state courts to enjoin political speech is unconstitutional.

The Chamber is a non-profit organization that represents business interests in dealing with all branches and phases of government. Concerned that Mississippi voters understand the issues raised by the Supreme Court candidates and race, the Chamber produced television advertisements that it aired during the three weeks before the election. These advertisements addressed the background, experience, and qualifications of several candidates.

Prior Restraints Of Chamber Political Speech

Shortly after the Chamber began running its ads, a dispute arose with Mississippi's Secretary of State Eric Clark and Attorney General Michael Moore as to whether the Chamber's ads contained "express advocacy" and, hence, might be subject to regulation by Mississippi. Seeking to clarify the legal situation, the Chamber brought a declaratory judgment action in the United States District Court for the Southern District of Mississippi, *Chamber of Commerce v. Moore*, No. 3:00CV778WS (S.D. Miss. filed Oct. 23, 2000). The action named Attorney General Moore and Secretary of State Clark as the defendants.[4]

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[4] Mississippi law imposes registration and disclosure requirements on organizations that make "expenditures," Miss. Code Ann. §§ 23-15-803 &

On November 2, 2000, United States District Court Judge Henry T. Wingate issued a Memorandum Opinion and Order in the Chamber's declaratory judgment action, No. 3:00CV778WS, 2000 WL 33709454 (S.D. Miss. Nov. 2, 2000). (Pet. App. 6a). As Judge Wingate explained, defendants had argued only that the Chamber's ads "expressly advocate the election of the favored candidates for the four Mississippi Supreme Court seats," (Pet. App. 8a), and thus were "'independent expenditures' subject to the reporting requirements" of Mississippi law. (Pet. App. 10a). Defendants had acknowledged having "no proof whatsoever of any collaboration between the Chamber ... the candidates involved in the advertisements." (Pet. App. 8a).

Judge Wingate's descriptions of the ads appear at Pet. App. 12a-14a. He recognized that the advertisements lacked explicit language advocating electoral action. However, adopting what he conceded to be a minority legal position, Judge Wingate ruled that the Chamber's ads fell within a "[b]roader [i]nterpretation" of express advocacy. (Pet. App. 21a-31a). Thus, Judge Wingate concluded that the "Chamber must answer under Mississippi's contribution limits and

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23-15-807 (2000). Additional reporting requirements apply to organizations that make "independent expenditures" that "expressly advocat[e] the election or defeat of a clearly identified candidate." *Id.* §§ 23-15-801(j) & 23-15-809. Mississippi law also restricts direct or indirect corporate "contributions" made "for the purpose of aiding any political party or any candidate for any public office." *Id.* § 97-13-15. (See Pet. App. 192a, 191a, 194a, and 201a). No one has disputed that these provisions apply only to speech that "in express terms advocate[s] the election or defeat of a clearly identified candidate" within the holding of *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam). Defendants argued, however, that the Chamber's ads were express advocacy because they clearly implied support of or opposition to particular candidates. The Mississippi election law does not purport to authorize injunctive relief as to violative advertisements, but instead provides for post-violation punishment. *Id.* §§ 23-15-813 (civil penalties); 23-15-811 & 97-13-17 (criminal penalties). (Pet. App. 196a, 195a, and 202a).

reporting requirements as found at Mississippi Code Annotated §§ 23-15-801 et seq." (Pet. App. 31a). This opinion made no mention of injunctive relief.

The district court ruling did not become final until Judge Wingate entered judgment on January 23, 2001. (Pet. App. 86a). The Chamber promptly appealed, and on April 5, 2002, a panel of the Fifth Circuit unanimously reversed. *Chamber of Commerce v. Moore*, No. 00-60779, 2002 WL 518638 (5th Cir. Apr. 5, 2002) (Pet. App. 170a).[5]

Although the district court ruling admittedly rested on a minority legal view and now has been reversed, Petitioner does *not* seek, through this petition, a further exegisis of the "express advocacy" standard. Regardless of whether Judge Wingate's opinion was right or wrong, Petitioner's First Amendment challenge to the prior restraint remains intact.

Beginning on Friday, November 3, 2000, Mississippi chancellors began summarily enjoining the Chamber's broadcast advertisements concerning the impending November 7 election. The first such order was issued at about 4:00 p.m. on Friday, November 3, after a brief hearing of which the Chamber's counsel received only oral notice and at which he received the motion papers as he arrived. (Pet. App. 42a, 38a, and 32a). In those papers, the plaintiff, Judge Vollor, asserted that Judge Wingate's opinion of the day before established that the Chamber's ads were unlawful and that, because the election was imminent, an immediate ban on the Chamber's advertisements was necessary to protect Judge Vollor from them. Such an order was issued.[6] (Pet. App. 42a).

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[5] A petition for rehearing en banc was filed on April 25, 2002.

[6] The order forbade both the Chamber and a variety of television stations from:

> contracting to transmit or transmitting any television advertisement, which is paid for or produced by the Chamber of Commerce of The

That same afternoon, the Chamber sought an emergency stay from the Mississippi Supreme Court, arguing there, as its counsel had at the hearing, that the order violated the First Amendment. (Pet. App. 45a). At 6:00 p.m., the Mississippi Supreme Court "denied" the Chamber's stay application as "without merit."[7] (Pet. App. 49a). The Chamber then turned to this Court.

Stays By This Court And More State Restraints

The Chamber's November 4, 2000, Motion for Emergency Stay of a Prior Restraint on Political Speech (No. 00A406) was delivered to this Court on Saturday, November 4. On the morning of Monday, November 6, 2000, Justice Scalia ordered stayed the November 3 prior restraint "pending the timely filing and disposition of a petition for writ of certiorari." (Pet. App. 63a).

Meanwhile, on Saturday, November 4, the Chancery Court of Harrison County issued another prior restraint, this one at the request of candidate Supreme Court Justice Oliver Diaz. (Pet. App. 50a). The next day, Sunday, November 5, the Chancery Court of Jones County granted to Judge Landrum the prior restraint challenged by this petition. (Pet. App. 4a). Both of these orders were issued ex parte.

Judge Landrum's verified complaint alleged that the Chamber "purchased political advertisements promoting an

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> United States of America, its agents, servants, or employees, concerning the Central District election for the Supreme Court of Mississippi between Jim Smith and Frank G. Vollor.

(Pet. App. 44a). The enjoined stations ceased broadcasting the ads. *See* Beverly Pettigrew Kraft, *Chamber TV Ads On, Off Again*, The Clarion-Ledger, Nov. 7, 2000, *available at* http://www.clarionledger.com/news/0011/07/07chamber.html.

[7] This Order was entered by a panel composed of Presiding Justice Banks and Justices McRae and Waller, none of whom then was a candidate for election.

opponent of the Petitioner, said ads being in violation of § 23-15-1021" of the Mississippi Code and further alleged, erroneously, that "the violation of said section has been found in an Opinion written by the Honorable Henry T. Wingate." (Pet. App. 54a). Of course, that was not accurate. Even assuming that the Wingate opinion justified a prediction that the current Chamber ads were likely to be determined to be "express advocacy"—a counter-factual assumption—the opinion expressly noted the absence of any coordination by the Chamber with any candidate. (Pet. App. 8a). Absent coordination, even express advocacy would not constitute unlawful speech. *See supra* n.4. At most, Judge Wingate's opinion suggested that the Chamber might eventually be obliged to file a report with Mississippi authorities.[8] Judge Landrum offered no evidence of any coordination. However, since the order was issued ex parte on Sunday afternoon, the Chamber had no opportunity to discuss those points with the court.

Because the new prior restraints and the applications therefor were not materially different from the first, and because resort to the Mississippi Supreme Court would be futile, the Chamber immediately supplemented its stay application in this Court, seeking relief from those further orders as well. *See November 5, 2000, Supplement to Motion for Emergency Stay of a Prior Restraint on Political Speech (No. 00A406)* (Pet. App. 56a). At about noon on November 6, Justice Scalia issued a further Order staying the November 4 and 5 Orders. (Pet. App. 64a).

On Monday, November 6, after Justice Scalia had stayed the first order, Judge Vollor's counsel went back before the same Hinds County Chancellor who had issued the first prior restraint. Ostensibly acting on behalf of "William A. Pyle, a

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[8] Mississippi law imposes reporting requirements on organizations that make "independent expenditures." Miss. Code Ann. §§ 23-15-801(j) & 23-15-809 (2000). (Pet. App. 191a and 194a).

citizen of Mississippi," Judge Vollor's counsel applied for a new prior restraint. (Pet. App. 65a). (In fact, Mr. Pyle is a lawyer and had assisted Judge Vollor's counsel in an undescribed capacity during the first TRO hearing of November 3.) (Pet. App. 39a). The motion papers confirm that both counsel and the Chancellor were aware of Justice Scalia's stay. (Pet. App.70a). Judge Vollor's lawyer and the Chancellor both knew who was representing the Chamber since he had appeared to oppose issuance of the first prior restraint on November 3. Nevertheless, without giving notice to the Chamber or permitting it any opportunity to be heard, the Chancellor granted another and even broader injunction against the Chamber's election-related speech. (Pet. App. 60a). Again, the papers relied on Judge Wingate's opinion as the only evidence of supposed illegality.

Upon obtaining the fourth prior restraint, the Chamber again supplemented its application for a stay from this Court. *See November 6, 2000, Second Supplement for Emergency Stay of a Prior Restraint on Political Speech (No. 00A411).* Another stay was promptly granted by Justice Scalia. (Pet. App. 72a). Stations resumed broadcasting Chamber ads on the evening of November 6.[9]

The Mississippi Supreme Court's Appeal-Rights Waiver Ruling

Judge Landrum came in third in the November 7 balloting and thus was eliminated as a candidate. Shortly thereafter, the Chamber timely appealed the Landrum prior restraint to the Mississippi Supreme Court. (Pet. App. 73a). Judge Landrum then moved to dismiss the appeal as not being taken from a "final order." (Pet. App. 75a). The Chamber responded that, under both Mississippi and federal practice,

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[9] *See* Beverly Pettigrew Kraft, *Chamber TV Ads On, Off Again*, The Clarion-Ledger, Nov. 7, 2000, *available at* http://www.clarionledger.com/news/0011/07/07chamber.html.

an order that grants a plaintiff all the relief he seeks is final, regardless of what it is called. *See supra* at n.2. A panel of the Mississippi Supreme Court denied the motion to dismiss. (Pet. App. 89a). The appeal was then briefed and, at the court's direction, submitted for decision without oral argument.

The Chamber's brief argued, *inter alia*, that the ex parte order constituted an unconstitutional prior restraint. (Pet. App. 93a). Judge Landrum's brief argued, *inter alia*, that temporary restraining orders are not appealable, the Court might sidestep broader issues by invalidating the order involved for lack of prior notice to the Chamber, and, on the propriety of the ex parte order itself, that "the Chancellor did not err or abuse his discretion in granting the TRO." (Pet. App. 139a).

Neither party argued or suggested any waiver of appellate rights by the Chamber. Nevertheless, the Mississippi Supreme Court's single-page February 7, 2002, Order, denying the Chamber relief, provided as follows:

> This matter having come before the en banc Court on the appeal filed by the Chamber of Commerce of the United States of America (Chamber) in the above styled case. After due consideration, *we find that the Chamber waived its right to appeal this case to this Court when it chose to file a motion to stay the state court proceedings with the United States Supreme Court.* Furthermore, the Court considered the fact that the Chamber failed to appear at the temporary restraining order (TRO) hearing in the Chancery Court of the First Judicial District of Jones County. This Court takes notice that the TRO issued by the Chancery Court of the First Judicial District of Jones County expired within ten (10) days. The case is hereby remanded to the Chancery Court of the First Judicial District of Jones County for any further proceedings not inconsistent with this order.

(Pet. App. 1a) (Emphasis added).

Significantly, the Mississippi Supreme Court did not reverse the panel's ruling that the appeal otherwise was proper. Instead, exercising its jurisdiction, it held that the Chamber had "waived its right to appeal this case to this [Mississippi] Court" by filing "a motion to stay the state court proceedings" with this federal Court.[10] The Order cited no authority for the waiver rule relied upon, and Petitioner knows of none.[11]

The Order also comments that the "Court considered the fact that the Chamber failed to appear at the temporary restraining order (TRO) hearing in the Chancery Court of the First Judicial District of Jones County," but it does not ascribe any weight to that consideration. Nor could it plausibly have done so. The prior restraint order set "a hearing . . . on whether or not this injunction should become permanent on the 8th day of November." (Pet. App. 5a). Since the election occurred on November 7 and Judge Landrum lost, there was no possibility that "this injunction"—which only dealt with election-related speech adverse to Judge Landrum's candidacy—could be made permanent. As described in the Order On Proceedings that the trial judge prepared for the Mississippi Supreme Court, when the Chamber did not appear on November 8, the trial judge displayed no surprise and evinced no displeasure, nor did he

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[10] The Order states that the appeal was considered "en banc." Of the nine then-sitting Mississippi Supreme Court justices, three were candidates in the November 7, 2000, election, and two, Justice Diaz (TRO #2 and TRO #3) and Justice Smith (TRO #1 and TRO #4) were candidates in the races addressed by the prior restraints.

[11] The Chamber petitioned the Mississippi Supreme Court to review the first prior restraint, but that Court never accepted the appeal or set a briefing schedule. *Chamber of Commerce v. Vollor*, No. 2000-M-01839. (Pet. App. 188a). Because the Chamber sought relief in this Court as to all of the Mississippi prior restraints, the waiver rule applied in this case by the Mississippi Supreme Court presumably would apply to that appeal also.

take any action as a result.[12] (Pet. App. 90a). As noted above, Respondents' brief to the Mississippi Supreme Court did not argue that any waiver had occurred.

Following the Mississippi Supreme Court's February 7, 2002, Order, Billy Joe Landrum obtained leave to amend his complaint to seek a "permanent injunction," as well as "compensatory and actual damages and punitive damages" from the Chamber, while dropping the media defendants who apparently had defeated diversity jurisdiction.[13] (Pet. App. 161a). On April 8, 2002, the Chamber removed the new claim to federal court on the grounds, *inter alia*, that diversity now exists and that Judge Landrum's new claim for emotional injury damages based on a previously unheard of tort of interference with an election is an entirely new claim for which a new removal period runs.[14] The parties have agreed to stay that action pending the outcome of this petition and of any further appeal of the Fifth Circuit ruling.[15]

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[12] Moreover, and ironically, although the Chamber's Washington, D.C. counsel ultimately obtained a copy of the prior restraint order informally, Judge Landrum and his counsel never served it on the Chamber's Mississippi counsel. That counsel (who spent November 6 litigating another matter for the Chamber), never received a copy or learned of the potential November 8 hearing until much later.

[13] That leave was obtained orally during a hearing on April 3, 2002, before the Fifth Circuit's April 5, 2002, decision in *Moore* was released.

[14] See *Billy Joe Landrum v. Chamber of Commerce, John Does A-Z*, No. 2:02CV93PG (S.D. Miss. filed Apr. 8, 2002).

[15] Nothing in 28 U.S.C. § 1257(a) (2000) suggests that this Court's express authority to review the final judgment or decree of a state supreme court is defeated when a post-judgment ruling by a state trial court leads to federal removal. However, if the Court deemed it necessary to perfect or maintain its jurisdiction, it could grant certiorari before judgment to the U.S. District Court for the Southern District of Mississippi under 28 U.S.C. § 2101(e) (2000). See *United States v. Nixon*, 418 U.S. 683 (1974).

REASONS FOR GRANTING THE WRIT

The most fundamental reason that certiorari should be granted is to correct the increasing tendency of state courts to impose summary prior restraints on core political speech as a way of preventing supposed election law violations. The First Amendment simply does not allow injunctions against future political speech—at least in absence of an imminent threat to national security. *See New York Times Co. v. United States*, 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring).

Regrettably, the four Mississippi prior restraints issued prior to the 2000 elections do not stand alone. Before the Mississippi events described above, similar restraints were imposed by state courts in Wisconsin and Florida. *See Elections Bd. v. Wisc. Mfrs. & Commerce*, 597 N.W.2d 721, 725 (Wis. 1999), *cert. denied*, 528 U.S. 969 (1999); *Republican Party of Fla. v. Fla. Elections Comm'n*, 658 So. 2d 653, 653-55 (Fla. Dist. Ct. App. 1995). A similar scenario was recently played out in connection with the November 6, 2001, Pennsylvania Supreme Court elections. *See* Order in *Bodack v. Law Enforcement Alliance of Am., Inc.*, Pa. Ct. Common Pleas (Allegheny Cty.) No. GD-01-121-66 (Oct. 23, 2001). (Pet. App. 157a). In that case as well, the Pennsylvania Supreme Court denied an application for emergency relief from the prior restraint. *Bodack v. Law Enforcement Alliance of Am., Inc.*, 790 A.2d 277 (2001). It is no secret that there is a strong inclination in some quarters to greatly expand regulation of campaign speech.[16] Unless this Court swiftly and authoritatively reaffirms the

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[16] The recently-enacted Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, seeks to replace the "express advocacy" test with a broader standard for federal purposes. Whatever standard applies, the issue of using summary prior restraint to ban political speech remains the same.

fundamental impropriety of imposing prior restraints on political speech, this practice will continue, and expand.

The Court also should grant the writ to vindicate its own critical role in our federal system. The fourth Mississippi prior restraint, knowingly issued on November 6 in the face of the stays granted by Justice Scalia, might be disregarded as a regrettable act by one individual. But the Mississippi Supreme Court's invention of a new rule that a party who seeks relief from this Court may be penalized by loss of state appellate rights is a considered act that also is notably hostile to this Court's role. Moreover, it is contrary to the Supremacy Clause and to due process.[17] This petition does *not* ask this Court to revisit the meaning of "express advocacy." That issue is separate and distinct from the propriety of issuing prior restraints against political speech.

A. Prior Restraints Against Political Speech Are A Growing And Disturbing Practice That Requires This Court's Review.

"Temporary restraining orders and permanent injunctions —*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993), *cert. denied*, 522 U.S. 869 (1997).

Prior restraints are "the most serious and the least tolerable" form of speech regulation. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (collecting authority). They are strongly presumed to be unconstitutional, even when their

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[17] In any event, the newly announced "waiver" rule is not an adequate and independent state ground that would bar consideration of the First Amendment claim. Only "'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim." *Lee v. Kemna*, 122 S.Ct. 877, 885 (2002) (quoting *James v. Kentucky*, 466 U.S. 341 (1984)).

goal is to regulate a form of speech that the First Amendment does not protect. *See Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-16 (1980) (per curiam) (collecting authority).[18] Where a prior restraint otherwise might be permissible, such as in regulating obscenity, it may not be imposed until after a final determination that the speech actually is obscene. *See id.* at 316-17. Political speech lies at the heart of the First Amendment. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). This Court has never sustained an injunction against prospective political speech. Although *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), held that so-called "express advocacy" may be regulated and that violations may be punished, they never suggested that prior restraints—much less summary prior restraints after little or no chance to respond—are appropriate. However, this Court has not explicitly and directly held that such prior restraint is forbidden, *and those seeking such restraints now can point to at least nine such orders in recent years*, two of which issued despite the stays granted by Justice Scalia in dealing with the 2000 Mississippi election situation.

The circumstances that led to the Mississippi injunctions are clear. Busy trial judges were importuned by candidates (fellow judges in Mississippi) with urgent claims that they were being injured by unlawful activity that, if not stopped immediately, would influence an impending election, causing them irreparable injury. Reassured by *Buckley* and *MCFL*

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[18] *Freedman v. Maryland*, 380 U.S. 51 (1965), contains criteria applicable to prior restraints. However, Justice Brennan, the author of *Freedman*, later explained that it "rest[s] upon the proposition that 'obscenity is not protected by the freedoms of speech and press.'" *New York Times Co.*, 403 U.S at 726 n.* (1971) (Brennan, J., concurring). Following that concurrence, this Court has not applied *Freedman* to speech that categorically is protected by the First Amendment.

that some election-related political speech is subject to regulation, the trial courts summarily granted injunctions, even on an ex parte basis. As a result, advertising was suppressed at a vital time for political speech, immediately before an election.

Mississippi judges were not the first to grant prior restraints against political speech, nor were they the last. Comparable prior restraints earlier had been imposed in both Wisconsin and Florida. In Wisconsin, at least three state circuit courts issued election-week temporary injunctions restraining an organization, WMC Issues Mobilization Council, Inc., from broadcasting its advertisements related to legislative elections to be held on November 5, 1996. *See Wisc. Mfrs. & Commerce*, 597 N.W.2d at 725. Despite emergency challenges by WMC Issues Mobilization Council, Inc. the injunctions remained in place. *Id.* In Florida, the state Democratic Party sought and received emergency injunctions before the November 8, 1994, election to stop television broadcasts of two political ads purchased by the Republican Party of Florida. A temporary injunction issued from November 2 to November 4 and, after another hearing, from November 4. On December 1, after the election, a Florida circuit judge issued a supplemental temporary injunction after hearing a motion for reconsideration. *Republican Party of Fla.*, 658 So. 2d at 653-55. Only belatedly did an appellate Florida court reverse one of these injunctions as "an unconstitutional prior restraint of speech." *Id.* at 654, 657.

Following the November 7, 2000, Mississippi elections, a similar TRO restraint was employed prior to the Pennsylvania Supreme Court elections held on November 6, 2001. At that time, only the stays of the Mississippi TROs entered by this Court suggested direct judicial disapproval of the Mississippi TROs, and the influence of those stays may have been diminished by this Court's May 29, 2001, denial of the

related petition for certiorari.[19] In any event, on October 23, 2001, two candidates who were incumbent Pennsylvania Supreme Court Justices secured a TRO from the Pennsylvania Court of Common Pleas against the Law Enforcement Alliance of America, Inc. (LEAA), restraining any advertisments broadcast for the purpose of influencing the outcome of the November 6, 2001, judicial elections unless LEAA certified compliance with the Pennsylvania political committee registration and reporting requirements.[20] Efforts to secure relief from the Pennsylvania Supreme Court proved unsuccessful, *Bodack*, 790 A. 2d at 277, and the restraint remained in effect until after the election.[21]

In sum, such prior restraints are a growing phenomenon. At least nine have been granted, only one was set aside, and none have been successfully challenged prior to the impending election except by stays from this Court. State courts are not subject to review by the federal courts of appeals. Only this Court can step in and make clear on a national basis that prior restraints on speech cannot be tolerated, at least in the absence of the most exigent

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[19] *Vollor*, 532 U.S. at 1058.

[20] Order in *Bodack v. Law Enforcement Alliance of Am., Inc.*, Pa. Ct. of Common Pleas (Allegheny Cty.) GD-01-121-66 (Oct. 23, 2001) (Pet. App. 157a).

[21] The Pennsylvania Supreme Court appeared to reason that either the challenged speech was intended to affect the election, in which case it properly was regulated, or it was not tied to the election, in which case suppressing the speech until after the election would not particularly injure the speaker. *Bodack*, 790 A. 2d at 278. However, elections are times when citizens are especially focused on political issues and, hence, are particularly vital times for political speech, whether or not it is intended to influence the election. Moreover, this Court has stressed that even brief periods of speech suppression inflict irreparable injury of constitutional dimension. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (plurality). And finally, there is no doctrine that a mere desire to affect an election deprives political speech of full constitutional protection.

circumstances, such as war or other threat to national security. Certainly such restraints cannot be justified by the alleged violation of regulatory requirements imposed by election law statutes or by claims of injurious falsehood of the type that have always been dealt with by defamation damages, not injunction.

B. The Mississippi Supreme Court's Waiver Rule Burdens Access To Federal Court Relief And Threatens To Insulate Prior Restraints From Judicial Review.

The Mississippi Supreme Court's February 7, 2002, Order deprived the Chamber of its right to appeal a denial of federally protected rights solely because the Chamber properly filed with this Court a motion for stay of the state court prior restraint. This Mississippi waiver rule, now that it is known, will force litigants such as the Chamber to make a choice between two undesirable options: (1) foregoing the possibility of timely relief from this Court, or (2) foregoing merits review by the state supreme court.

Thus, the effect of the Mississippi waiver rule is to substantially burden a Mississippi state court litigant's right to invoke a federal court remedy. This imposition appears designed to and could well have the effect of discouraging state court litigants from exercising their rights to seek emergency relief from this Court. State courts are not generally permitted to impose penalties designed to deny access to federal remedies or federal courts, and such a practice is particularly questionable in the context of enjoining political speech.

As this Court has construed the Supremacy Clause, "it is not within the power of state courts to bar litigants from filing and prosecuting *in personam* actions in federal courts." *General Atomic Co. v. Felter*, 434 U.S. 12 (1977) (per curiam) (applying principles adopted in *Donovan v.*

Dallas, 377 U.S. 408 (1964)). Similarly, the authority of states "to prescribe the rules and procedures governing suits in their courts . . . does not extend so far as to permit States to place conditions on the vindication of a federal right." *Felder v. Casey*, 487 U.S. 131, 147 (1988). Thus, "the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such a manner that all the substantial rights of the parties under controlling federal law [are] protected.'" *Id.* at 151 (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942)).

Simply stated, a state court has no business penalizing a litigant's resort to a federal remedy, particularly where that remedy's ultimate purpose will be frustrated by the penalty imposed. Such state action is contrary to the Supremacy Clause and to the principles of federalism it reflects.

Moreover, this Court's Fourteenth Amendment precedents have long recognized that state procedures that deprive civil litigants of the important right to be heard can constitute a denial of liberty or property without due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (state procedural rule denying relief where agency erroneously scheduled a hearing after a stated cutoff date held to violate due process); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (state court filing and service fees applicable to divorce cases held to prevent access to the divorce remedy by indigents so as to deny due process); *Natural Gas Pipeline Co. of Am. v. Slattery*, 302 U.S. 300 (1937) (applying statutory penalties for violation to a corporation pending attempt to test validity of order in the courts would be a denial of due process).[22]

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[22] Some decisions have analyzed similar issues using equal protection concepts as well as due process concepts. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (Mississippi statutes requiring purchase of appeal record by indigent mothers as prerequisite to appeal in parental rights termination case held to violate equal protection and due process clauses).

Such decisions establish that "the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan*, 455 U.S. at 429. In that context, this Court has interpreted the Due Process Clause "as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'" *Id.* at 429-30 (quoting *Boddie*, 401 U.S. at 380). A "State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie*, 401 U.S. at 379. Moreover, a "system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated." *Logan*, 455 U.S. at 434-35.

A state court waiver rule of the type the Mississippi Supreme Court has adopted denies groups like the Chamber the liberty to engage in political speech in violation of due process within the meaning of the Fourteenth Amendment. Intervention by this Court is needed to limit expansion of this rule to others and to other states, as well as to relieve the burden faced by those engaging in political speech in Mississippi.

If the Mississippi waiver rule were adopted widely, prior restraints enjoining election-related speech would become increasingly unreviewable, with this Court's power to stay being the last remaining effective remedy. Review by this Court of this case is needed before such waiver rules combine with the increasing use of summary prior restraints on political speech to act as a fearsome one-two punch threatening political speakers such as the Chamber.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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